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U.S. Citizenship and Immigration Services

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JAN 2 ~ 2005

[redacted]

FILE: EAC 03 110 53773 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its chief executive officer as a nonimmigrant intracompany transferee pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Delaware that is operating as an information security technology company. The petitioner claims that it is the parent of the beneficiary's foreign employer, located in London, United Kingdom. The petitioner now seeks to employ the beneficiary for two years.

The director denied the petition concluding that the petitioner failed to demonstrate: (1) that the beneficiary's foreign employer and the petitioning entity are qualifying organizations; and (2) that the beneficiary is employed by the United States entity in a primarily managerial or executive capacity.

Counsel subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel claims that a parent-subsidiary relationship exists between the two organizations as proven by a previously submitted stock transfer agreement. Counsel submits an attestation from the petitioner's chief operating officer confirming the operations of the foreign business. Counsel also claims that the beneficiary is employed in the United States as a manager and states that the size of the petitioner's staff is not determinative of the beneficiary's employment capacity. Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue is whether the beneficiary's foreign employer and the petitioning entity are qualifying organizations as required in the Act at section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> > *(1)* Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
> >
> > *(2)* Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,
> >
> > *(3)* Otherwise meets the requirements of section 101(a)(15)(L) of the Act.
>
> (H) *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.
>
> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
>
> (J) *Branch* means an operating division or office of the same organization housed in a different location.
>
> (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
>
> *(L) Affiliate* means
>
> > *(1)* One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
> >
> > *(2)* One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner filed the nonimmigrant petition on February 25, 2003 noting that the beneficiary's foreign employer, Visage Developments Limited, is a wholly owned subsidiary of the United States company. In an

attached document titled "Relationship between Visage Developments Limited ("VDL") and Real Use Corporation ("RUC")" the petitioner explained:

> RUC was formed as a wholly owned subsidiary of VDL. In March 2000 the group was restructured and the relationship reversed so that RUC became the parent of VDL and VDL became the wholly owned subsidiary of RUC – which remains the position today.

On March 10, 2003, the director issued a request for additional evidence asking that the petitioner submit documentation establishing the ownership and control of both the United States and foreign entities. The director noted that the evidence should include copies of stock certificates, stock ledgers, each company's articles of incorporation, and joint-venture agreements, if applicable. The director also requested that the petitioner provide evidence, such as sales invoices or transaction statements establishing that each organization is doing business in its respective country.

Counsel responded in a letter dated March 21, 2003. As evidence of a qualifying relationship between the two organizations counsel submitted the petitioner's subscription and stock transfer restriction agreement. which counsel stated confirms a parent-subsidiary relationship. Section 4 of the agreement, which is dated March 8, 2000, states:

> 4. Purchase and Issuance of Common Stock.
>
> (a) *Subscriptions.* Within two (2) business days of the Effective Date, the Stockholders shall tender their shares and abandon their options to purchase shares of the capital stock of Visage Development, Ltd.. a corporation organized and existing under the laws of the United Kingdom ("VDL"). Upon such tender, the [petitioning] Corporation shall thereupon, and in full consideration thereof, issue and deliver to each Stockholder a certificate or certificates evidencing ownership of the number of shares of the Common Stock of the Corporation depicted below immediately after each Stockholder's name:

JCB Compact Products Ltd.	12,019
[redacted]	1,250
	4,845
	1,584
	458
	458
	280
	6,709
	5,863
	1,705
	1,330
	1,138
	417
	613

* * *

> (d) *Warranty.* The parties represents [sic] and warrant that they shall have good and marketable title to all shares of VDL capital stock which they shall transfer to the Corporation pursuant to this Paragraph 4, and that each party has full power and lawful authority to consummate and perform the transactions contemplated herein.

Counsel also provided sales invoices and a list of the foreign company's six employees as evidence that the foreign entity is doing business abroad.

In a decision dated April 4, 2003, the director determined that the petitioner had failed to demonstrate that the beneficiary's foreign employer and the petitioning organization are qualifying organizations. The director stated that the petitioner's subscription and stock transfer restriction agreement "indicates that other companies own and therefore control 34% of the company [redacted] and his trusts and [redacted] own 20% of the company, the founder and the director own 20% of the company while others not listed in the initial filing own 25% of the company." The director stated that the evidence submitted with the petition and in response to the director's request for evidence does not establish "that the ownership and control of the two companies would qualify the companies as being affiliated." The director further noted that it is unclear whether the documentary evidence submitted in support of a qualifying relationship pertains to the foreign entity or the United States entity.

The director also determined that the petitioner had failed to submit evidence demonstrating that the foreign company is continuing to operate abroad during the beneficiary's absence. Consequently, the director concluded that the beneficiary's foreign employer and the United States entity are not qualifying organizations, and denied the petition.

Counsel filed an appeal on May 5, 2003, explaining that at the time of the petitioner's incorporation as a United States organization, the petitioning organization was a subsidiary of the beneficiary's foreign employer. Counsel states that under the terms of the subscription and stock transfer restriction agreement, which was entered into seven days after the incorporation, "the qualifying relationship was reversed and Visage, the foreign company, became the wholly owned subsidiary of the U.S. corporation, Real User." Counsel includes on appeal copies of the foreign entity's audited financial statements for the years 2001 and 2002, which counsel states indicate that the foreign company is controlled by the petitioning organization. Counsel also submits a letter from the petitioner's chief operating officer, who states in his letter that the foreign entity is a wholly owned subsidiary of the petitioning organization.

Counsel also contends that the foreign entity has been doing business in the United Kingdom during the beneficiary's assignment in the United States. Counsel states that the beneficiary's foreign employer is responsible for the petitioner's technology and product development, and will likely be responsible for the petitioner's British and European sales and services. Counsel submits an additional list of the foreign entity's employees, and again references an April 29, 2003 letter from the petitioner's chief operating officer. In his letter, the chief operating officer stated that "although [the foreign entity's] operations in the last two years have been cut back due to our focus on the US market, it remains a key component of our business strategy," and explained that the foreign entity holds patents for the petitioning organization and continues to maintain and file new patents on behalf of the petitioner. The officer also stated that the petitioner's product development team, Internet service, and web site collocation facility are based in the United Kingdom.

Counsel submits wire transfer receipts between the foreign and United States entities, which counsel claims are also evidence of a qualifying relationship and the business operations of the foreign entity.

On review, the petitioner has not conclusively established that the beneficiary's foreign employer and the petitioning entity are qualifying organizations.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In the present matter, the petitioner submitted its subscription and stock transfer restriction agreement both with the nonimmigrant petition and in response to the director's request for additional evidence as evidence of a qualifying relationship. While probative of a relationship between the foreign and United States entities, the agreement alone is not sufficient to establish that the petitioner is the parent company of the beneficiary's foreign employer. Counsel neglected to provide a stock certificate or additional documentation specifically requested by the director that would confirm the petitioner's stock ownership and control of the foreign organization. As noted above, the regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Additionally, the chief operating officer's claim of a parent-subsidiary relationship in his April 29, 2003 letter does not conclusively establish a qualifying relationship. Going on

record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, the foreign entity's financial statements for the years 2001 and 2002 contain conflicting information as to the entity's ownership. The AAO acknowledges that the financial statements for each year contain language identifying the petitioning organization as the parent of the foreign entity. However, page seven, note one of the foreign entity's 2001 statement indicates "[t]he company was, at the end of the year, a wholly-owned subsidiary of another company incorporated in the United Kingdom." The record does not contain any evidence explaining this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner also failed to demonstrate that the foreign entity is doing business in the United Kingdom during the beneficiary's absence. The three sales invoices reflecting charges to the foreign entity do not substantiate the petitioner's claim that the foreign entity is operating in the United Kingdom. Each invoice, although addressed to the foreign entity, is mailed "care of" the petitioning organization to its United States office. Two invoices indicate charges to the foreign company for web design and software development, while the third reflects charges for air and train fare to Washington, DC. It is unclear how these invoices are relevant to the foreign entity's business operations. Additionally, the wire transfer statements submitted by counsel on appeal do not represent anything more than a transfer of funds from the petitioner to the foreign organization. Again, these are not significant to establishing business operations of the foreign corporation. Furthermore, the petitioner's chief operating officer, in his April 29, 2003 letter submitted on appeal, recognizes that the foreign entity operations "have been cut back" in the past two years. Consequently, the AAO cannot conclude that the foreign entity has been doing business in the United Kingdom during the beneficiary's absence.

Based on the above discussion, the petitioner has failed to demonstrate that the beneficiary's foreign employer and the petitioning organization are qualifying organizations. Accordingly, the appeal will be dismissed.

The AAO will next consider whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> (i) Manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

(i) Directs the management of the organization or a major component or function of the organization;

(ii) Establishes the goals and policies of the organization, component, or function;

(iii) Exercises wide latitude in discretionary decision-making; and

(iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner stated in the nonimmigrant petition that the beneficiary would be employed in the United States as chief executive officer and would be responsible for the direction, management, and oversight of the petitioning organization, reporting only to the company's board of directors and shareholders. In an attached letter from the petitioner, dated February 13, 2003, the petitioner's chief operating officer provided the following description of the beneficiary's employment in the United States:

[The beneficiary's] position in [the petitioning organization] is Chief Executive Officer and as such he is responsible for all the company's activities. The company's Chief Operations Officer, Chief Financial Officer and Chief Technology Officer all report directly to [the beneficiary], who in turn reports to the Board of Directors of the company (of which he is a member). [The beneficiary's] day to day duties include: capital raising, business and strategic planning, negotiations of contracts with strategic partners and key customers, the hiring of staff and managing relations with the Company's Advisors and Investors.

Since arriving in the USA, [the beneficiary] has been successful in establishing a core team of dedicated staff and a large group of associates (industry experts and other professionals) who provide consulting and support services to and for the Company on an as-needed basis.

The chief operating officer noted that the beneficiary would continue under the extended petition to be compensated with an annual salary of $216,000.

The petitioner also provided copies from its Website identifying its management team as: chief executive officer, chief operations officer, chief technology officer, chief financial officer, vice-president of security integration, vice-president of customer services, and financial controller. The accompanying documentation also indicated that the petitioner had a six-person team of advisors. In an attached 2002 annual shareholders report, the petitioner further explained its personnel structure, noting that two additional workers, directors of business development, began sales activities in New York and the United Kingdom on a part-time, commission-only basis.

In the director's March 2003 request for evidence, the director asked that the petitioner submit the following evidence demonstrating the beneficiary's employment in a qualifying capacity: (1) a list of all workers, including the beneficiary, employed by the petitioner, a description of their positions, and a breakdown of the number of hours devoted to each employee's specific tasks; (2) copies of each employee's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement; (3) a copy of the petitioner's most recent IRS Form 941, Employer's Quarterly Tax Return; and (4) any documentation related to contractors used by the petitioner.

Counsel included in his March 21, 2003 response a list of the petitioner's employees again outlining the management and advisor team. The petitioner included on the list a brief description of each employee's weekly tasks, noting that all except the beneficiary and the chief operations officer were employed on a contract basis for less than forty hours per week. The petitioner also noted that it employed two salaried workers, a controller and an executive assistant, who each worked eight hours per week. Counsel provided the executive assistant's Form W-2 as confirmation of her employment. Counsel also provided employment contracts for the members of the petitioner's management team.

As additional evidence of the beneficiary's employment in a qualifying capacity, counsel submitted a letter from the petitioner's chief operations officer. In the March 17, 2003 letter, the chief operations officer stated that the beneficiary is responsible for developing the petitioner's business and growth strategies, directing all functions of the company's operations, hiring and firing senior personnel, raising capital, investor relations, media, public and industry relations, and the development of strategic alliances. The petitioner's officer further stated that the beneficiary was responsible for supervising the petitioner's executive team and board of advisors, all of who reported to the beneficiary. The petitioner's chief operations officer also explained that the daily activities of the business are performed by its sales, marketing and customer support teams, product and web development team, and by the financial controller.

In his April 4, 2003 decision, the director determined that the petitioner had failed to demonstrate that the beneficiary was and would be employed by the United States entity in a primarily managerial or executive capacity. The director stated that despite the petitioner's claim that it employs a management and advisory team of eleven workers, the evidence, including the petitioner's Forms W-2 and its federal quarterly tax return, indicate that the petitioner's staff includes only two workers. The director also stated that even if the beneficiary were supervising a staff of eleven employees, including five non-managerial employees, "it is not evident that those five non-managerial employees are relieving the managerial personnel from performing the duties of the daily operation of the company." The director determined that the managerial employees "must be performing some of the duties of the company and would not qualify the beneficiary as supervising managers of the company." The director concluded that the beneficiary would not be performing in a managerial capacity, except in job title alone. Consequently, the director denied the petition.

On appeal, counsel states that the beneficiary has been and would continue to function in a managerial capacity, and claims that the beneficiary's managerial duties are clearly outlined in article III, section II of the petitioner's accompanying by-laws. Section II provides:

> The Chief Executive Officer shall be a director of the Corporation. He shall have general oversight of the management and direction of the business of the Corporation as well as all powers ordinarily exercised by the Chief Executive Officer of a corporation. He shall, when present, preside at all meetings of the stockholders or directors. The Chief Executive Officer shall perform such other duties as the Board of Directors may direct.

Counsel states:

> Since his initial entry in valid L-1A status, [the beneficiary's] primary duty has been to direct the entire organization. *At no time have his responsibilities included "primarily" performing the tasks necessary to produce the product or provide the services of the organization* rather he has functioned and will continue to function as a true executive or manager with primary duties to direct the management of the U.S. company; establish organizational goals and policies, exercise a wide latitude of discretionary decision making and receive only general supervision or direction from the company's Board of Directors. During 2001 [the beneficiary] personally directed or accomplished the following:
>
> - The negotiation and execution of partnership agreements with SAIC, a leading government systems integrator and with Netegrity, a major Web security company;
> - The first major sales of the company's Enterprise Security products[;]
> - The launch of a new "out-of-the-box" password security solution, Passfaces for Windows; [and]
> - Obtained additional funding for the company led by an institution investor, AIV, (Advanced Infrastructure Ventures[])].
>
> In 2003 and beyond [the beneficiary] will continue to oversee the direction and goals of the U.S. company and to achieve increased market share for it's [sic] products and services through innovative and aggressive business development.
>
> Essentially at this stage of the U.S. company's development, [the beneficiary's] primary duties are to direct, manage, oversee and control the entire direction of the U.S. organization; the sale and marketing of its products and services; obtaining additional capital; entering into partnership and joint venture agreements and ultimately to control the work of other professional, supervisory, or managerial employees who have yet to be hired.

(emphasis in original). Counsel also refers to an April 29, 2003 letter from the petitioner's chief operations officer, which counsel claims clearly outlines the beneficiary's managerial responsibilities.

Counsel challenges the director's reference to the number of workers employed by the petitioner, stating that the "management of a function" without personnel responsibilities may be a basis for classification as an L-1A manager.

Counsel also claims that the petitioning organization has grown to a sufficient size to support the beneficiary in a primarily managerial or executive position. Counsel submits a letter from the petitioner's chief financial officer, an Executive Overview, and financial statements, which counsel states reflect the petitioner's growth and its business plan for expansion in the United States. Counsel also contends that the attacks on September 11, 2001 have prevented the petitioner from meeting its original goals, but that "the U.S. Company has now raised sufficient financial capital and entered into significant contracts and grown to sufficient size to support a managerial position for the beneficiary and ensure that it will be able to remunerate the beneficiary and continue to do business in the United States."

On review, the petitioner has not established that the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity. The instant petition is the petitioner's second request for an extension of the beneficiary's nonimmigrant status. The petitioner indicated in the petition that the beneficiary was previously approved for an extension of his L-1A status based on a petition involving a new office. Therefore, the instant matter will not be reviewed as a request for an extension pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(i).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* Moreover, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

Although counsel claims that the beneficiary directs, manages and oversees the direction of the United States organization, the record supports a finding that the beneficiary is still performing tasks similar to those performed in the development of a business, which are not typically categorized as managerial or executive. Specifically, the beneficiary is involved in raising capital for the corporation and planning the petitioner's corporate strategy. Additionally, the beneficiary is responsible for such non-qualifying functions of the business as negotiating contracts and performing the sales and marketing of the petitioner's products and services. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Based on the petitioner's representations of the beneficiary's job duties, it does not appear that the petitioning organization is capable of supporting the beneficiary as a manager or an executive. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Also, counsel acknowledges on appeal that the beneficiary is not supervising or directing management of the organization, or professional or supervisory workers as required in the Act at sections 101(a)(44)(A) and (B). Counsel states that the beneficiary will "ultimately . . . control the work of other professional, supervisory, or managerial employees who have not yet been hired." The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development.

At the time of filing, the petitioning organization had been established for two years and employed the beneficiary and a chief operations officer on a full-time basis. The petitioner explained in its business plan and accompanying documentation that it employed additional personnel, who devoted approximately one hour to twelve hours per week to the business. Based on the petitioner's representations, it does not appear that the petitioner employs a staff sufficient to meet the reasonable needs of the organization. The majority of the petitioner's workforce is employed on a less than part-time basis, and specifically, the petitioner's two non-managerial employees, the controller and the administrative assistant, each work eight hours per week. The petitioner has not offered any explanation how its reasonable needs are met by the full-time employment of the beneficiary and the chief operations officer only.

Furthermore, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary is employed by the United States entity in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.